Public Prosecutor (SPRM) v Robin ak Sabai

HIGH COURT (SRI AMAN) — CRIMINAL APPEAL NO SRA-42A AC-1/9 OF 2013
MAIRIN IDANG JC
25 SEPTEMBER 2014

Criminal Law — Corruption — s 18 — Offence of knowingly used with intent to deceive principal with document containing false material particulars — Accused person charged with 36 amended charges under s 18 of the Malaysian Anti-Corruption Commission Act 2009 — Accused person acquitted and discharged of offence — Appeal by prosecution — Whether prosecution established prima facie case

The appellant appealed against the decision of the sessions court judge ('the SCJ') in discharging and acquitting the respondent of all charges without calling for his defence. The appellant had initially preferred 36 charges against the respondent with one Alphonsus Billie. However after a plea bargaining the said Alphonsus Billie had pleaded guilty to nine charges and was sentenced to one day imprisonment and a fine of RM7,000 in default of two months for each of the nine charges. The respondent was then charged with 36 amended charges under s 18 of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') for knowingly used with intent to deceive his principle, a document, to wit, *Pesanan Kerajaan* which contained false material particulars. In arriving at his decision, the SCJ made a finding that the prosecution had failed to establish a prima facie case against the respondent on all the 36 amended charges. The respondent was then acquitted and discharged. Dissatisfied with the decision of the SCJ, the appellant filed the present appeal.

Held, dismissing the appeal and affirming the decision of the sessions court:

(1) The respondent was not involved in the scheme to cheat the government. There were attempts to implicate the respondent but there was nothing to support their assertion that it was upon the respondent's instruction that they had prepared and submitted the documents for payments. PW4 had not even mentioned the involvement of respondent. Now PW3 and PW10 had testified that the invoices were given by the respondent to them yet PW4 and PW5 had in evidence said that they had not given the Petracom and Sarena Enterprise invoices to anybody. A valid question that could be asked was who gave the Petracom and Sarena Enterprise invoices to the respondent, bearing in mind that these invoices were the very invoices that were submitted to support the payments paid to the accounts of Petracom and Sarena Enterprise. What was very clear was

that PW4 had testified that after he received the payments from the government he would retain 5% and the balance he would pay to PW10. It was also not in evidence that the payment to PW10 would be shared between PW10, PW3 and the respondent (see para 30).

(2) Where a witness is an accomplice then his evidence would require corroboration. However s 52(1)(a)(iii) does away with the need for corroboration. This section did not apply to the present case where the charge against the respondent was for and offence of intending to deceive the government under s 18 of the Act. Section 52(1)(a)(iii) referred to acts in relation to gratification. The prosecution's submission on this had no basis. The SCJ was therefore correct in his finding that both PW3 and PW10 were accomplices and their evidence would require corroboration which the SCJ had found to be wanting (see para 35).

[Bahasa Malaysia summary

Perayu merayu terhadap keputusan hakim mahkamah sesyen ('HMS') dalam melepaskan dan membebaskan responden terhadap kesemua tuduhan tanpa memanggil untuk pembelaan. Perayu telah pada mulanya mengenakan 36 tuduhan terhadap responden dengan seorang yang bernama Alphonsus Billie. Walau bagaimanpun selepas persetujuan akuan Alphonsus Billie telah mengaku bersalah kepada sembilan tuduhan dan dijatuhkan hukuman satu hari penjara dan denda sebanyak RM7,000 jika ingkar, dua bulan untuk setiap sembilan tuduhan tersebut. Responden kemudiannya dipertuduh dengan 36 tuduhan yang dipinda di bawah s 18 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta') kerana mengguna dengan pengetahuan bersama niat untuk menipu prinsipnya, dokumen, iaitu, Pesanan Kerajaan yang mengandungi butiran material yang palsu. Dalam membuat keputusan, HMS membuat dapatan bahawa pihak pendakwaan telah gagal untuk membuktikan kes prima facie terhadap responden ke atas kesemua 36 tuduhan yang dipinda. Responden dibebaskan dan dilepaskan. Tidak berpuas hati dengan keputusan HMS, perayu memfailkan rayuan ini.

Diputuskan, menolak rayuan dan mengesahkan keputusan mahkamah sesyen:

(1) Responden tidak terlibat di dalam skim untuk menipu kerajaan. Terdapat percubaan untuk membabitkan responden tetapi tidak terdapat apa-apa untuk menyokong desakan mereka bahawa ia adalah atas arahan responden mengarahkan mereka menyediakan dan menyerahkan dokumen untuk bayaran. PW4 tidak langsung memberitahu mengenai penglibatan responden. Di sini PW3 dan PW10 telah memberi keterangan bahawa invois-invois diberikan oleh responden kepada mereka tetapi PW4 dan PW5 telah dalam keterangan menyatakan bahawa mereka tidak memberikan invois-invois Petracom dan Sarena Enterprise kepada sesiapapun. Soalan sah yang boleh dipersoal adalah

siapa yang memberi invois-invois Petracom dan Sarena Enterprise kepada responden, mengambil kira bahawa invois-invois ini adalah invois-invois yang diserahkan untuk menyokong bayaran yang dibayar kepada akaun-akaun Petracom dan Sarena Enterprise. Apa yang jelas adalah bahawa PW4 telah memberi keterangan bahawa selepas dia menerima bayaran daripada kerajaan dan akan mengekalkan 5% dan baki akan dibayar kepada PW10. Juga tidak jelas bahawa bayaran kepada PW10 akan dikongsi di antara PW10, PW3 dan responden (lihat perenggan 30).

(2) Di mana seorang saksi adalah rakan subahat dengan itu keterangannya akan memerlukan sokongan. Walau bagaimanapun s 52(1)(a)(iii) tidak memerlukan sokongan. Seksyen ini tidak diguna pakai kepada kes ini di mana tuduhan terhadap responden adalah untuk kesalahan terhadap niat untuk menipu kerajaan di bawah s 18 Akta. Seksyen 52(1)(a)(iii) merujuk kepada tindakan berkaitan kepada pemuasan hati. Hujahan pihak pendakwaan ini tidak mempunyai asas. HMS oleh itu adalah betul dalam dapatannya bahawa kedua-dua PW3 dan PW10 adalah rakan subahat dan keterangan mereka memerlukan sokongan di mana HMS dapati adalah perlu (lihat perenggan 35).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127, CA (refd)
Chong Siew Choong v PP [1996] 5 MLJ 65; [1996] 2 CLJ 823, HC (refd)
Chua Tiang Chang v PP [2011] 1 LNS 774, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379, FC (refd)
PP v Dato Hj Azman bin Mahalan [2010] 6 MLJ 833, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Datu Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Abdul Rahman Mohamad [2005] 1 CLJ 700, CA (refd)
PP v Raja Visvalingam [2013] 1 LNS 27, HC (refd)
Yahaya Abdullah v PP [1991] 1 CLJ 398, HC (refd)
Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor [1999] 5 MLJ 180; [1998] 1 LNS 363, HC (refd)

Legislation referred to

Criminal Procedure Code s 307, 307(1), (2), (5)
Malaysian Anti-Corruption Commission Act 2009 ss 18, 52(1)(a)(iii)
Prevention of Corruption Act 1997 (repealed by the Anti-Corruption Act 1997) s 11(c)

Law Chin How (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
RJ Noel (RJ Noel Advocates) for the respondent.

Mairin Idang JC:

INTRODUCTION

[1] The appellant is appealing against the decision of the learned session court judge ('the SCJ') in discharging and acquitting the respondent of all charges without calling for his defence.

[2] The appellant had initially preferred 36 charges against the respondent and one Alphonsus Billie. However after a plea bargaining the said Alphonsus Billie had pleaded guilty to nine charges and was sentenced to one day imprisonment and a fine of RM7,000 in default of two months for each of the nine charges. The other 27 charges against Alphonsus Billie were withdrawn.

[3] The respondent was then charged with 36 amended charges. After reading the 36 amended charges they are all for offences under s 18 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) ('the MACCA') and punishable under s 24 of the same Act. On reading the 36 amended the only differences are in respect of the dates, times, *Pesanan Kerajaan* numbers and the amounts involved. For the purpose of these grounds of judgment I shall reproduce only the first amended charge.

[4] The amended charges read as follows:

> That you on the 31st January 2009, between 8am until 5pm at the Sekolah Menengah Kebangsaan (SMK) Ulu Layar, Betong, in the District of Betong, in the Betong Division, in the State of Sarawak, as an agent of Government of Malaysia, to wit, a principal of SMK Ulu Layar, Betong (Robin anak Sabai) knowingly used with intent to deceive your principle, a document, to wit, Pesanan Kerajaan No 4972700, dated 01.01.2009 amounted RM5,030, in which the agent's principal has an interest in it and which contains false material particulars, to wit, the items which were stated in the Pesanan Kerajaan No 497270 were supplied when in actual fact the items were never been supplied, and to your knowledge was intended to mislead your principal and that you have thereby committed an offence under section 18 of MACCA 2009 (Act 694) and punishable under section 24 of the same Act (Act 575).

[5] Now s 18 of the MACCA reads:

> Offence of intending to deceive principal by agent
>
> A person commits an offence if he gives to an agent, or being an agent he uses with intent to deceive his principal, any receipt, account or other document in respect of

which the principal is interested, and which he has reason to believe contains any statement which is false or erroneous or defective in any material particular, and is intended to mislead the principal.

[6] The prosecution's case can be gleaned from the amended charge itself. Section 18 of the MACCA is in pari materia with s 11(c) of the Prevention of Corruption Act 1997 thus the prosecution has to prove the ingredients of the offence as per the amended charge as in the case of *Yahaya Abdullah v Public Prosecutor* [1991] 1 CLJ 398 at p 399.

[7] The ingredients of the offence are:

(a) the accused was an agent of the government of Malaysia, the principal of SMK Ulu Layar Betong;

(b) the accused used the documents in respect of which his principal was interested;

(c) the documents contained statements which were false in material particulars;

(d) the accused had reason to believe that the statements were false in material particulars and that he intended them to mislead the principal; and

(e) when the accused used the documents, he knowingly used such documents with intent to deceive his principal.

[8] Now in order for the learned SCJ to establish a prima facie case he would have to subject all the prosecution's evidence on a maximum evaluation on each and every ingredients of the amended charges against the respondent (*Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1).

[9] It is therefore clear that in arriving at his decision the learned SCJ would have on a maximum evaluation scrutinised the prosecution's evidence then only made a finding that the prosecution had failed to establish a prima facie case against the respondent on all the 36 amended charges. The learned SCJ had then on the 19 August 2013 delivered his ruling. The full grounds of the learned SCJ's decision were also provided.

THE APPEAL

[10] Dissatisfied with the decision of the learned SCJ the appellant had filed its notice of appeal ('NOA') on the 4 September 2013. The petition of appeal (POA) was filed on the 22 January 2014. The appellant had submitted several grounds in its petition of appeal.

A WHETHER THE APPEAL IS COMPETENT

[11] Learned counsel for the respondent submitted that the prosecution's appeal is incompetent. His contention was that the NOA (p A1–A2 appeal record Vol 1/5) did not state in its intitulement or in the body thereof the statute or rule of court that the appellant is invoking to move this honourable court. learned counsel for the respondent also submitted that the NOA was filed out of time.

[12] Learned counsel for the defendant submitted that it is mandatory that the NOA is to clearly show in the intitulement or the body of the NOA the rule of court or statute that the appellant is invoking. It is the contention of learned counsel for the respondent that the omission could not be cured under the inherent jurisdiction of the court as such the appeal should be struck and the appeal be dismissed. The cases of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127, *Chong Siew Choong v Public Prosecutor* [1996] 5 MLJ 65; [1996] 2 CLJ 823 and *Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor* [1999] 5 MLJ 180; [1998] 1 LNS 363 were cited.

[13] Learned counsel for the prosecution had not assisted me by filing any submission on this issue. It would have been helpful to know the prosecution's stance on this issue.

[14] Now the NOA was filed under s 307 of the Criminal Procedure Code s 307(1) makes provision for the appellant to file the NOA in triplicate addressed to the high court within 14 days from the judgment, sentence or order being pronounced. Section 307(2) states that every NOA must contain an address at which any notices or documents connected with the appeal may be served upon the appellant or his advocate.

[15] I have read the NOA, it is addressed to the judge of the High Court Kuching and the same had also stated the address for service. I think the NOA had complied with the requirements of s 307(1) and (2) respectively. Now s 307(5) is stated in para 3 of the NOA. I do not think that the respondent here or the court for that matter was taken by surprise by the filing of the NOA. As such this issue is a non issue.

[16] The other issue taken up by learned counsel for the respondent is that the filing of the NOA was out of time. At the outset there is no dispute that the NOA was filed on the 4 September 2013 (see A1 and A2 appeal record Vol 1/5). It is also not disputed that the learned SCJ ruling was on the 19 August 2013 (see pp 178–183 appeal record Vol 3/5). Learned counsel for the respondent said the NOA was filed 16 days after the ruling as such the appeal

is not before me and I should strike out the same. The respondent's counsel had not cited any authorities on this and neither had the prosecution.

[17] On this issue and after making the necessary calculation the NOA must be filed by the 2 September 2013. I agree with the submission of learned counsel for the respondent that since the appellant had not filed an appeal against the learned SCJ's ruling within the time frame as stipulated in s 307(1) of the Criminal Procedure Code, and as there is no application for enlargement of time to file the a notice of appeal, there is in effect no appeal before this court on the discharge and acquittal of the respondent. In the case of *Chua Tiang Chang v Public Prosecutor* [2011] 1 LNS 774, the appellant had not filed the notice of appeal within the extended time granted by the Court of Appeal. There the Court of Appeal found the preliminary objection raised by the learned deputy public prosecutor to be well founded. The Court of Appeal was of the view that 'Laxity in relation to compliance with the court's rules must not be tolerated and has to be curbed'. The Court of Appeal thus held the appeal to be incompetent and dismissed it accordingly.

[18] As I see it the case law on this is very clear. In the premises and on this ground alone I would dismiss this appeal on the ground of non-compliance with the mandatory fourteen days to file an appeal under s 307(1).

[19] Now there are also other matters that I am urged to consider in this appeal. I shall for the purpose of completion address them and in doing so I shall also be referring to the learned SCJ's grounds of decision (see pp 184–193 appeal record Vol 3/5).

THE PETITION OF APPEAL

[20] The appellant had submitted several grounds in its petition of appeal. The appellant had listed nine grounds in its POA:

(a) the learned trial judge erred in law and in facts in holding fact when he failed to take into account the evidence of the prosecution clearly showed that all the local purchases orders (referred as 'LPOs), exhs P1(c)–P36(1)(c) were prepared by PW3 and PW10 respectively under the instruction of the respondent;

(b) the learned trial judge erred in law and in facts when he failed to take into account that the prosecution had successfully proved that the respondent knew that the items stated in all the LPOs were never supplied by PW4's company and PW5's company when the respondent instructed PW3 and PW10 to prepare all LPOs as per charges;

(c) the learned trial judge erred in law when he held that PW3 and PW10 are accomplices in this case, hence their evidence required corroboration. In holding so, the learned trial judge had failed to invoke the presumption under s 52(1)(a)(iii) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) that clearly state that PW3 and PW10 shall not be regarded as accomplices;

(d) the learned trial judge erred in law and in facts when he failed to take into consideration the facts that PW10 had already been convicted and sentenced and, therefore, had nothing to gain by giving false testimony on behalf of the prosecution;

(e) the learned trial judge erred in law and in facts when he held that PW3 and PW10 are accomplices and their evidence need to be taken with extra caution but the learned trial judge had failed to rule on the credibility of PW3 and PW10;

(f) the learned trial judge erred in law and n facts in holding that there are many doubts could not be resolved in this case without specifically identifying what are the doubts;

(g) the learned trial judge had erred in law and in facts when he failed to make the necessary inference against the respondent in respect of the letter of admission of PW3 (P39) which was signed by PW3 under the instruction of the respondent for PW3 to admit that he had forged the signature of the respondent in the LPOs;

(h) the learned trial judge's decision in acquitting and discharging the respondent at the close of the prosecution's case is most unsatisfactory and cannot be supported having regard to the weight of evidence adduced by the prosecution; and

(i) the decision of the learned trial judge in acquitting and discharging the respondent is against the weight of the totality of the evidence adduced by the prosecution.

ANALYSIS OF THE PETITION OF APPEAL

[21] Now before I discuss the nine grounds let me first say that from the 36 charges preferred against the respondent the basis of the charges were the 36 LPOs (pesanan kerja). These LPOs are related to orders purportedly made by the respondent who was the pengetua of SMK Ulu Layar Betong to suppliers (PW4 and PW5) for the supply of items allegedly stated in the LPOs. The prosecution case was that the LPOs contained false material particulars namely the items which were stated in the LPOs (*Pesanan Kerajaan*) were supplied when in actual fact the items were never been supplied and that the respondent had used the LPOs with intent to mislead the principal.

[22] Now from the evidence documents in support such as invoices from Petracom and Sarena Enterprise, payment vouchers, *borang kelompok* were also prepared by PW3 and PW10 and PW4 to support the payments made to Petracom and Sarena Enterprise.

[23] The prosecution says that there were overwhelming evidences to prove the respondent had misled his principal in submitting the LPOs which contained false materials for payments as stated in the charges.

[24] Learned counsel for the respondent submitted that during the course of the trial the evidence unfolded painted an entirely different picture. It was the school financial clerk Alphonsus Billie ('PW10') and the school laboratory assistant Denil Ranti ('PW3') who had filled in the 36 LPOs, approved the purchases, filled in the payment vouchers, the borang kelompok and forwarded the entire paperwork to the Jabatan Akauntan Negari ('JAN'), Sri Aman Office for payment to be made to the suppliers (PW4 and PW5). Learned counsel for the respondent had listed the following persons as the 'dramatis persona': Muhd Jefri bin Ninchi, the Deputy Director Jabatan Akauntan Negeri ('PW1'), Denil ak Ranti, the former school lab assistant (PW3), Voon Su Shiong, the owner of Serena Enterprise ('PW4'), Maajedi bin Awing Antik, the owner of Petracom ('PW5'), Paul Alexander Lawan, the Assistant Customer Service Manager CIMB Bank Bhd ('PW7') and Alphonsus Billie, the former school financial clerk (PW10).

[25] I will now deal with grounds a, b and g:

(a) the learned trial judge erred in law and in facts in holding fact when he failed to take into account the evidence of the prosecution clearly showed that all the local purchases orders ('LPOs'), exhs P1(c)–P36(1)(c) were prepared by PW3 and PW10 respectively under the instruction of the respondent;

(b) the learned trial judge erred in law and in facts when he failed to take into account that the prosecution had successfully proved that *the respondent knew that the items stated in all the LPOs were never supplied by PW4's company* and PW5's company when the respondent instructed PW3 and PW10 to prepare all LPOs as per charges; and

(g) the learned trial judge had erred in law and in facts when he failed to make the necessary inference against the respondent in respect of the letter of admission of PW3 (P39) which was signed by PW3 under the instruction of the respondent for PW3 to admit that he had forged the signature of the respondent in the LPOs.

[26] It is the contention of the appellant that the LPOs were all filled up by PW3 and PW10 on instruction of the respondent. Counsel for the respondent

submitted that the LPOs were filled in by PW3 and PW10 who had also forged the respondent's signature on the LPOs. Now during the trial PW3 had admitted that it was wrong and a criminal offence to forge the respondent's signature (lines 1–5, p 161 Vol 2/5 appeal record). But PW3 claimed it was on the respondent's instruction that he forged exhP1 to P21 yet PW3 did not make a police report or reported to the authorities (lines 17 p 159 and line 19 p 160 Vol 2/5 appeal record) on the alleged instruction to forge the signature. PW3 had also signed a confession admitting to the forgery of the respondent's signature (lines 7–17 p 149 Vol 2/5 appeal record). PW3 had also admitted to have entered into arrangement with PW10 that he would admit to forging of exhP1-36 and resigned in consideration of PW10 promising to support him and his family (lines 8–26 p 165 Vol 2/5 appeal record).

[27] Now PW10 was the financial clerk of the school. Learned counsel for the respondent regarded PW10 to be the mastermind in the scheme to cheat the government that PW10 had confessed to forging exh P28–P36 had pleaded guilty and was sentenced then turned prosecution witness against the respondent. It was also contended by learned counsel for the respondent that PW10 had persuaded PW3 to sign exh P39 (a letter of admission) with the promise that he would take care of PW3 family. PW10 had also persuaded PW3 to sign exhP40 to admit forging PWIO's signature but PW3 had refused to do so (line 8 p 145 and line 5 p 146 Vol 2/5 appeal record). On the allegation that it was the respondent who had instructed PW10 to wrongfully fill in exhP22–P36 and though acknowledging it was wrong PW10 had not made any police report nor reported to the authorities. Learned counsel for the respondent PW10 was in communication with the supplier PW4 namely Voon Shu Shiong. PW10 would inform PW4 when Jabatan Akauntan Negara had banked in payments into his bank accounts (line 5 p 155 to line 24 p 156 Vol 3/5 appeal record). It is the assertion of learned counsel for the respondent that PW10 had to inform PW4 of such payments since PW10 had an interest in the said payments. Learned counsel for the respondent further contended that the evidence had shown that PW10 had not entered debits in the *Buku* Vote to keep tracks of the school's expenditure (lines 17–20 p 157 Vol 3/5 appeal record); PW10 had never made enquiry whether goods in exhP22 to P36 were supplied and delivered to the school and yet PW10 knew of the payment to PW4 and had received his share of the payments. Learned counsel for the respondent also submitted that when JAN discovered the items were not supplied in respect of 22 LPOs the respondent had suspended PW10 from his job as the financial clerk (lines 14–21 p 158 Vol 3/5 appeal record).

[28] The prosecution submitted that both PW4 and PW5 had never seen invoices P1(d)–P36(d) and neither supplied the same and that the invoices used by Sarena Enterprise and Petracom were handwritten. Now the evidence showed that PW4 had met PW10 who wanted to borrow PW4's licence to

supply the items stated in invoices P1(d)–P36(d). PW4 also testified that PW10 would call PW4 once payments were credited to the accounts of Petracom and Sarena enterprise. PW4 also testified that he would retain 5% of the payments received for income tax and would give the rest to PW10.

[29] Now this is what the learned SCJ had to say in his grounds of decision on the payment vouchers, invoices, *borang kelompok* and his scrutiny of the respective evidence of PW3, PW10 and PW4:

> ... He (Denil anak Ranti (PW3)) even admitted to forging the Accused's and PW10's signatures in preparing the Baucar Bayaran (payment Vouchers) in Exhibits P1 (b) to P21 (b) before preparing the Borang Kelompok in Exhibits P1 (a) to P21 (a)(see lines 9 to 12 p 187 Appeal Record Vol 3/5).
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> However, PW3's testimony revealed that he had forged the accused's and PW10's signatures for the purpose of facilitating payments to the payment vouchers in Exhibits P1 (b) to P21 (b) and PW10 had pleaded guilty to the nine alternative charges Nos 28 to 36. There were no doubt that PW3 and PW10 knew of their repercussions.' (see lines 10–15 p 188 Vol 3/5 appeal record).
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> Both PW3 and PW10 were crossed examined to the fullest extent as to their allegations of the Accused's involvement, but this court found that their evidence could not align to point towards the Accused.' (see lines 16–18 page 188 Vol 3/5 appeal record).
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> PW3 even admitted to forging the Accused's and PW10's signatures in preparing the Baucar Bayaran (payment Vouchers) in Exhibits P1 (b) to P21 (b) before preparing the Borang Kelompok in Exhibits P1 (a) to P21 (a)(see lines 9 to 12 page 187 appeal record). PW3's testimony revealed that he had forged the accused's and PW10's signatures for the purpose of facilitating payments to the payment vouchers in Exhibits P1 (b) to P21 (b) and PW10 had pleaded guilty to the nine alternative charges Nos 28 to 36. There were no doubt that PW3 and PW10 knew of their repercussions.' (see lines 10–15 page 188 appeal record). Both PW3 and PW10 were crossed examined to the fullest extent as to their allegations of the Accused's involvement, but this court found that their evidence could not align to point towards the Accused.' (see lines 16–18 page 188 Vol 3/5 appeal record).
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> In the main, it was PW3's and PW10's allegation that the Accused instructed them to prepare for the payment for the false invoices. However, PW3 revealed something peculiar. It was this. There was apparently, an assurance from PW10 would be looking after the welfare of PW3 should the latter confess to the whole state of affair.' (see lines 20–25 page 188 Vol 3/5 Appeal Record).
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> PW10 may have attempted to cast the blame on the Accused for his predicament, but learned counsel's cross examination of PW10 revealed that he was the main perpetrator of the offences in the 36 charges. PW3 was also involved in so far as the charges Nos 1 to 21 were concerned.' (see lines1–5 page 189 Vol 3/5 Appeal Record).

'There is a question that need an answer. Why would the accused want PW3 to forge his signature if at all the invoices came from him and all three of them, that is, the Accused, PW3 and PW10 were in cahoots?' (see lines 7–10 page 189 Vol 3/5 Appeal Record).

'...the evidence of Voon Su Shiong (PW4) was quite telling in that, despite him denying knowing about the money paid by SMK Ulu Layar through Jabatan Akauntan Negara Sri Aman into the account of Serena Enterprise, he revealed in his cross-examination that PW10 had gone to see him in order to use his company's supplies and which PW10 listed out in Exhibits P1 (d) to P36(d).' (see lines 16–21 p 189 Vol 3/5 Appeal Record).

Apparently, there was an understanding between PW4 and PW10 that he could retain 5% of the monies which had been paid into his company's account for allowing PW10 to use the same. PW4 would of course, withdraw the rest of the amount which were handed over to PW10. What was pertinent to note was that he never mentioned the accused's involvement' (see line 23–26 p 189 and lines 1–3 p 190 Vol 3/5 Appeal Record).

As had been mentioned earlier, nowhere did PW4 make any allegations of the accused's involvement in the whole affair. In fact, PW4 revealed that he had permitted PW3 and PW10 to utilize the invoices of Serena Enterprise and Petracom and he had received 5% of the amount from the transaction which involved invoices Exhibits P1 (d) to P36(d).'(see lines 14–19 p190 Vol 3/5 Appeal Record).

In short, PW4 was with PW3 and PW10 in the thick of the scheme of things. Aside from PW3's and PW10's allegation towards, the accused, PW4 never mentioned of the accused being involved in the same scam. (see Lines 24–25 page 191 and lines 1–2 page 192 Vol 3/5 Appeal record).

However in this case, in view of PW4's evidence, it was clear that the accused was not involved in the offences as alleged herein. Instead, PW4's evidence was clear in showing that PW3 and PW10 were the ones who had used Serena Enterprise's and Petracom's invoices in order to profit from the payments made to both business enterprises. In this case, the court not, but reiterate that, both PW3 and PW10 were accomplices. Indeed, the court was extra cautious, but, because there was no evidence to corroborate their evidence, this court was of the view that, their evidence were higly unreliable. PW4's evidence was of no help to the prosecution as he was also involved together with both of them.' (see lines 10–20 p 192 Vol 3/5 Appeal Record).

... PW3 may have insisted that it was the accused who had instructed him to prepare the documents herein, but his evidence crumbled when he admitted that, PW10 and he had come to understanding that PW10 would support him financially should he confess to the whole thing. It must also be remembered that he had admitted to the forgery of the signatures in the documents as aforesaid. Again, this clearly showed that PW3 and PW10 were accomplices between themselves. (see lines 24–26 p 192 and lines 1–5 p 193 Vol 3/5 appeal record).

[30] From the grounds of decision it is clear to me that learned SCJ had scrutinised and analysed the evidence of PW3, PW10 and PW4. It is also clear to me from my analysis of the evidence that the respondent was not involved in

the scheme to cheat the government. PW3 and PW10 had tried to implicate the respondent but there was nothing to support their assertion that it was upon the respondent's instruction that they had prepared and submitted the documents for payments. Further PW4 had not even mentioned the involvement of respondent. Now PW3 and PW10 had testified that the invoices were given by the respondent to them yet PW4 and PW5 had in evidence said that they had not given the Petracom and Sarena Enterprise invoices to anybody. Then a valid question could be asked who gave the Petracom and Sarena Enterprise invoices to the respondent, bearing in mind that these invoices were the very invoices that were submitted to support the payments paid to the accounts of Petrcom and Sarena Enterprise. Surely PW4 or PW5 would have mentioned that they had given the invoices to the respondent yet there no evidence of this coming from PW4 and PW5. What is very clear is that PW4 had testified that after he received the payments from the government he would retain 5% and the balance he would pay to PW10. It was also not in evidence that the payment to PW10 would be shared between PW10, PW3 and the respondent.

[31] I shall deal with grounds c and e:

(c) the learned trial judge erred in law when he held that PW3 and PW10 are accomplices in this case, hence their evidence required corroboration. In holding so, the learned trial judge had failed to invoke the presumption under s 52(1)(a)(iii) of the Malaysian Anti-Corruption Commission act 2009 (Act 694) that clearly state that PW3 and PW10 shall not be regarded as accomplices; and

(e) the learned trial judge erred in law and in facts when he held that PW3 and PW10 are accomplices and their evidence need to be taken with extra caution but the learned trial judge had failed to rule on the credibility of PW3 and PW10.

[32] The prosecution submitted that s 52(1)(a)(iii) of the MACCA 2009 clearly states that evidence of accomplice is admissible and conviction can be sustained based on the evidence of accomplice solely even if there is no corroboration on the evidence of an accomplice. The prosecution had relied on *Public Prosecutor v Dato Hj Azman bin Mahalan* [2010] 6 MLJ 833 and *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 on the issue of accomplice. Learned counsel for the respondent submitted that the presumptions in s 52(1)(a)(iii) are not activated since in the grounds of judgment the learned SCJ said 'Again this clearly showed that PW3 and PW10 were accomplices between themselves'. Learned counsel for the respondent had also cited *Public Prosecutor v Raja Visvalingam* [2013] 1 LNS 27 on the definition of an accomplice.

[33] On the issue of accomplice and s 52(1)(a)(iii) of the MACCA 2009 this is what the learned SCJ said:

> Again, this is clearly showed that PW3 and PW10 were accomplices between themselves (see lines 4–5 p 193 Appeal record VOL 3/5).
>
> The prosecution had ventured to submit on the issue of accomplice in this case. Indeed, this court was reminded of s 52(1)(a)(iii) of the MACC Act 2009 as well as the case of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379, *Public Prosecutorv Dato' Seri Anwar bin Ibrahim* [1998] 2 CLJ 215, *Public Prosecutor v Andal bin Arolla* [2013] 7 MLJ 797 (see line 4–8 p 192 Appeal Record VOL 3/5)
>
> However, in this case, in view of PW4's evidence, it was clear that the accused was not involved in the offences as alleged herein. Instead, PW4's evidence was clear in showing that PW3 and PW10 were the ones who had used Serena Enterprise's and Petracom's invoices in order to profit from the payments made to both business enterprises. In this case, the court not but reiterate that, both PW3 and PW10 were accomplices. Indeed, the court was extra cautious, but, because there was no evidence to corroborate their evidence, this court was of the view that, their evidence were highly unreliable. PW4's evidence was of no help to the prosecution as he was also involved with both of them. (lines 10–20 p 192 Vol 3//5 appeal record).

[34] Section 52(1)(a)(iii) is as follows:

> Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act
>
> (a) No witness shall be regarded as an accomplice by reason only of such witness having—
>
> (i) ...
>
> (ii) ...
>
> (iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

[35] It is trite law that where a witness is an accomplice then his evidence would require corroboration. However s 52(1)(a)(iii) does away with the need for corroboration. On reading the said section I think it does not apply to the present case where the charge against the respondent was for and offence of intending to deceive the government under s 18 of the MACCA 2009. I think s 52(1)(a)(iii) refers to acts in relation to gratification. The prosecution's submission on this has no basis. The learned SCJ was therefore correct in his finding that both PW3 and PW10 were accomplices and their evidence would require corroboration which the learned SCJ had found to be wanting.

[36] Assessment of credibility of a witness is the domain of the trial judge. Now on the credibility of both PW3 and PW10 I think learned SCJ had considered this when he made a finding that they are accomplices and their evidence were highly unreliable.

[37] On ground f:

(f) the learned trial judge erred in law and facts in holding that there are many doubts could not be resolved in this case without specifically identifying what are the doubts.

[38] The prosecution submitted that the learned SCJ had failed to specifically identify what were the doubts. Learned counsel for the respondent submitted that the doubts are as follows: which included whether the filling up of exh P1 to P36 was instructed by the respondent; whether respondent collected the invoices from PW4 or PW4 had given permission to PW3 and PW10 to use Petracom and Sarena Enterprise's invoices; whether money withdrawn by PW4 was to be delivered to respondent; whether PW10 did not deliver exh P1 to P36 to JAN, Sri Aman; PW1's evidence that it was PW10 who delivered the claims for payment; why would the respondent ask PW3 to forge his signature when embarking on criminal enterprise.

[39] From reading the grounds of decision the learned SCJ had raised doubts on the evidence of the prosecution's witnesses namely PW3, PW10 and PW4. I would repeat para (28) hereinabove.

[40] I shall now deal with h and i:

(h.) The learned trial judge's decision in acquitting and discharging the respondent at the close of the prosecution's case is most unsatisfactory and cannot be supported having regard to the weight of evidence adduced by the prosecution.

(i.) The decision of the learned trial judge in acquitting and discharging the respondent is against the weight of the totality of the evidence adduced by the prosecution.

[41] The prosecution submitted that the prosecution had successfully proven the ingredients of the offence which I have stated in para (7) hereinabove. In summary the prosecution also submitted that the respondent had possession of the invoices and it was the respondent that had given them to PW3 and PW10 to enable them to prepare LPOs, payment vouchers, borang kelompok. It was also the prosecution's submission that the respondent had known that the invoices contained false particulars. Learned counsel for the respondent submitted that the learned SCJ after having gone through the

evidence on maximum evaluation was correct in his decision that the prosecution had not proven all the ingredients of the charge and as such a prima facie case had not been made out against the respondent. Learned counsel for the respondent also contended that the court had committed no error of fact or law in concluding that it was unsafe to call upon the respondent to enter his defence and correctly ordered the respondent to be discharged and acquitted of all 36 amended charges against him.

CONCLUSION

[42] It is now made clear by the decision in *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65 an *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 the trial court must at the close of the case of prosecution undertake a maximum evaluation of the evidence adduced on behalf of the prosecution which includes 'a positive evaluation of the credibility and reliability of all the evidence so as to determine whether the elements of the offence has been established.' With this in mind and having read the appeal records namely the grounds of decision I have no doubt that the learned SCJ had subjected the prosecution's evidence on a maximum evaluation. In line 7–17 p 193 Vol 3/5 this is what the learned SCJ said 'This court was mindful of the case cited by the learned prosecuting officer, ie *Public Prosecutor v Datu Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 which dealt with discrepancies in witnesses' testimonies but, having made maximum evaluation of the evidence for the prosecution, this court found many doubts which could not be resolved in this case. In view of the foregoing reasons, it was the opinion of the court that, the prosecution had filed to establish a prima facie case against the accused on all 36 counts. In the circumstances, this court discharged and acquitted the accused of all the amended charges herein without calling for his defence.

[43] In *Public Prosecutor v Abdul Rahman Mohamad* [2005] 1 CLJ 700 at p 707 Tengku Baharudin Shah JCA said: The functions of an appellate court in an appeal from the decision of a trial judge, which decision was based on his opinion respecting the credibility and trustworthiness of the witness he saw are limited in their scope and character. In order to reverse, the appellate court should not merely entertain doubts as to whether the decision below is right, but must be convinced that it is wrong.

[44] After perusing the appeal records, petition of appeal, the submissions of both counsel for the appellant and respondent and the authorities filed herein, I have to say that the said appeal had no merit. I therefore dismiss the said appeal and I affirm the decision of the learned SCJ that the respondent Encik Robin ak Sabai is discharged and acquitted.

Appeal dismissed and decision of the sessions court affirmed.

Reported by Afiq Mohamad Noor